RECORD AND 1 BRIEFS

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Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY, et al.,

Respondents.

On Writ Of *Certiorari* To The Court Of Appeals Of The State Of Wisconsin

BRIEF OF CARLISLE FORD RUNGE, DANIEL W. BROMLEY, JAY COGGINS, DAVID E. ERVIN, NOELWAH R. NETUSIL, RAYMOND B. PALMQUIST, AND R. WILLIAM PROVENCHER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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The economists identified below respectfully submit this brief *amicus curiae* in support of Respondents.

THE INTEREST OF *AMICI*

The *amici* have no personal stake in the outcome of this case.[1] Their interest is in helping the Court understand how regulatory restrictions affect the value of land insofar as these insights may help the Court to analyze this takings claim involving a lot merger zoning provision. Joining in this brief are the following professors of economics whose teaching and research have focused on the effects of regulations and other government actions on private property interests:

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[1] This brief is filed with the written consent of all the parties. Pursuant to Supreme Court Rule 37.6, *amici* state the McKnight Foundation, a Minnesota-based family foundation, made a financial contribution to support the preparation and submission of this brief; no other person or entity, including any party or any counsel for a party, made a financial contribution to fund the preparation or submission of this brief. No counsel for a party authored this brief in whole or in part.

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SUMMARY OF ARGUMENT

Regulations have both negative and positive effects on the value of private land. Regulations have a negative "development" effect by limiting what can occur on a specific parcel of land. At the same time, regulations have a positive "amenity" effect by protecting the attributes of an area that make it an attractive place to live and invest. In addition, regulations have a positive "scarcity" effect by restricting the amount of development that can occur in an area, making each remaining development opportunity – and each already developed property – more valuable than they

would be in the absence of regulation. As numerous precedents of this Court recognize, the *net* economic effect of restrictions on regulated properties can only be determined by counting *both* the positive effects and the negative effects of regulation.

Economic analysis suggests that St. Croix County's lot merger provision meets the Court's standard of "fairness and justice" because it allows owners of adjacent substandard lots to make reasonable use of their property while denying them an opportunity to reap a windfall not available to their neighbors. In general, allowing an owner of a substandard lot to build in violation of a minimum lot size requirement means the owner incurs none of the negative development effects of the zoning while reaping the positive amenity and scarcity effects of the zoning. This result may be justified as necessary to avoid the economic wipeout that would result from strict enforcement of the zoning. But a case involving two adjacent substandard lots is quite different than a case involving a single substandard lot. Allowing an owner to build in violation of the zoning on two adjacent substandard lots would mean the owner still incurs none of the negative development effects – while reaping the positive benefits of the zoning. As a result, the owner of the lots would receive a windfall not available to owners of comparably-sized properties in the same zoning district. On the other hand, enforcing a lot merger provision avoids conferring a windfall on the owner of adjacent substandard lots, while guaranteeing that such an owner can make the

same use of his or her property as other owners of comparably-sized properties.

A lot merger provision is a "fair and just" solution – indeed it is arguably the best solution from an economic standpoint – to the question of how to apply minimum lot size requirements to commonly owned adjacent substandard lots.

ARGUMENT

I. Economic Theory Predicts that Regulatory Restrictions Will Have Both Negative and Positive Effects on the Value of Regulated Private Lands

It is sometimes assumed – in everyday conversation, political discourse, and some judicial opinions – that regulatory restrictions on permitted uses of privately-owned land invariably have negative effects on the value of land. But regulatory restrictions also have positive effects on land values. The *net* effect of restrictions on regulated properties can only be determined by counting both the positive and the negative effects. Disregarding the positive effects of regulation on property values, either in individual cases or in a set of cases, risks creating inaccurate estimates of regulations' effects on property values.

On one side, legal restrictions on permitted uses of private land may reduce its value by prohibiting or restricting what can occur. Economists have called this the "development effect." *See, e.g.*, Noelwah R. Netusil,

The Effect of Environmental Zoning and Amenities on Property Values: Portland, Oregon, 81 Land Econ. 227, 228 (2005). The proceeds ("rent") that can be earned from owning a tract of land influence its economic value. Restricting the most profitable use of land, all else equal, will reduce its value. The magnitude of the development effect will vary with location and market conditions. In an urbanized area with keen competition for development sites, restrictions can have a substantial development effect. Beyond the urban fringe, where land markets are largely influenced by agricultural or forestry production, the development effect may be modest. A further complexity is that regulatory restrictions in one community may have second-order effects on land values in other communities, especially those close by. *See* Jeffrey A. Michael & Raymond B. Palmquist, *Environmental Land Use Restriction and Property Values*, 11 Vt. J. Envtl. L. 437 (2010).

On the other side, the negative effects of a regulation may be offset by the positive "amenity effects" of the same regulation. *See id.* at 438. Regulation that applies to all or a substantial portion of a community (zoning being the quintessential example) not only restricts what one owner can do on her land but also what neighbors can do on *their* lands. For example, a zoning ordinance may limit the permitted density of development in a portion of the community. Such a regulation may limit congestion and preserve the scenic and natural attributes of the area, making it an attractive place to live and invest. By preserving amenities

that make an area attractive to buyers, land use regulations raise property values above those that would prevail in their absence.

In addition, negative development effects may be offset by a third effect of regulatory restrictions, known as the "scarcity effect." In general, any limitation on the supply of a good or service will tend to increase its market value. The scarcity effect in a takings context was recently discussed by Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit in *Callahan v. City of Chicago*, 813 F.3d 658 (7th Cir. 2016). The case involved a takings challenge to a city regulation limiting the rates that taxi cabs can charge riders. Owners of taxi medallions, Judge Easterbrook observed, derived value from the city's limit on the number of medallions issued. These limits "produc[ed] a regulatory scarcity that offsets the effect on owners of capping what they can charge." *Id.* at 660. Data showing recent increases in medallion values, despite the regulation of taxi fares, "impl[ied] the absence of confiscatory regulation." *Id.* In short, regulations that create scarcity can increase the value of private property.

In the context of real property interests, regulations that limit land development, in particular density controls, can increase the value of regulated lands due to the scarcity effect. Jeffrey A. Michael & Raymond B. Palmquist, *supra*, at 438. For example, a property owner able to build ten single-family units on her land under prior law, who is subject to a new regulation

limiting the number to eight, may benefit from adoption of the regulation. A restriction on the permitted density of development throughout a community or a substantial portion of a community reduces the total number of development opportunities, making each remaining opportunity to engage in development more valuable because it is scarcer. Thus, even though reducing the permitted number of units to eight prevents the construction of two units, each of the eight units remaining may be more valuable, so that the value of the sum of eight may exceed that of ten. For the same reason, new regulations may increase the value of already developed properties; by restricting opportunities to engage in new development, regulations limit the future supply of developed properties, making already developed properties more valuable.

It is important, however, to distinguish between the effects of regulations on developed versus undeveloped land. For developed property, if the owner does not intend to further develop it (such as a typical single family homeowner in a residential zone), the effects of the adoption of heightened regulatory standards are likely to be positive (and only positive) due to both amenity and scarcity effects. By contrast, if the owner holds undeveloped land, new regulatory restrictions are likely to have negative development effects as well as positive amenity and scarcity effects. How the positive scarcity and amenity effects and the negative development effects will net out will depend on the circumstances of the case. As a matter of theory, it is indeterminate whether the net effects are negative or

positive. As Professor Laura Underkuffler has explained:

> [L]and use-regulation – including significant land use restrictions – affect land values in often unpredictable ways. They might (as conventionally predicted) decrease values in some cases, but they might increase land values in others.

Laura S. Underkuffler, *Takings and the Problem of Value: Grappling with Truth in Land-Restriction Cases*, 11 Vt. J. Envtl. L. 465, 467 (2010).[2]

II. Empirical Studies Confirm that Regulations Have Both Negative and Positive Effects on Land Values.

The theoretical complexity discussed above is borne out in empirical studies. Most studies estimating the impacts of government action on property values use forms of "hedonic analysis," in which the influence of different characteristics of property, such as the number of bedrooms in houses or whether the property is located in a flood plain, are used to explain variations in property values. *See* Sherwin Rosen, *Hedonic*

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[2] Government actions also positively influence property values in other ways, including public infrastructure investments, subsidy programs, and other "givings." Tracing these effects is no more complicated than determining how regulatory restrictions negatively affect property values. *See* Laura S. Underkuffler, *supra*, at 475 (observing that "[a]ssessments of benefits conferred by government would be no different – if the motivation were there – than assessment of government detriments").

Prices and Implicit Markets: Product Differentiation in Pure Competition, 82 J. Pol. Econ. 34 (1974). One of the characteristics that can be examined in hedonic studies is the regulatory restrictions that apply to land.

Representative examples of hedonic studies examining land use regulations include:

- A study of lakefront zoning restrictions in Wisconsin concluded that larger minimum lakefront requirements for second-home residential development resulted in a net increase in lakefront property values. The authors found that the average per-foot value of lakefront property subject to a 200-foot minimum frontage rule was 21.5% greater than the average per-foot value of properties subject to a 100-foot minimum frontage rule, suggesting that the positive amenity effect of such zoning outweighed the negative development effect. Fiorenza Spalatro & Bill Provencher, *An Analysis of Minimum Frontage Zoning to Preserve Lakefront Amenities*, 77 Land Econ. 469 (2001).

- A study of the effect of development restrictions on agricultural land in three Maryland counties (Calvert, Carol, and Howard) found no statistically significant evidence that restrictions adversely affected sales values. Although the authors found a slight correlation between development restrictions and lower land prices, they concluded that "preservation did not appear to significantly reduce

sales prices from unpreserved parcels." Cynthia Nickerson & Lori Lynch, *The Effect of Farmland Preservation Programs on Farmland Prices*, 83 Am. J. Agric. Econ. 341(2001).

- A study of sales prices of undeveloped properties in Baltimore County, Maryland, found no difference in the value of land zoned for one house per five acres vs. one house per 50 acres. The authors concluded that there was no statistical difference between the per-acre value of five-acre land and of 50-acre land, and could not even determine whether greater restrictions tended to increase or decrease land values. They speculated that, "with the spread of subdivisions over the countryside in the larger metropolitan areas, lands that are protected from subdivision by zoning may sell at a premium." In other words, according to the authors, "buyers may be willing to spend more for protection from development." Applied Data Resources, Inc., on behalf of the Maryland Environmental Trust, Report to the Valleys Planning Council on the Trading Value of RC-2 Zoned Land Compared with RC-4 Zoned Land in Northern Baltimore County (1996).

- A study of properties around the Chesapeake Bay in Maryland subject to the Chesapeake Bay Critical Area Law, adopted by the Maryland legislature in

1986, concluded that the law had no discernible adverse effects on property values. The authors found that over the six-year study period vacant land values did not decline, while the value of developed residential properties increased significantly. W. Patrick Beaton & Marcus Pollock, *Economic Impact of Growth Management Policies Surrounding the Chesapeake Bay*, 68 Land Econ. 434 (1992).

- A Study of properties in the New Jersey Pinelands subject to the New Jersey Pineland Protection Act concluded that the legislation imposed no "wipeouts" on property owners, including owners of undeveloped land in the most restricted areas of the Pinelands, but conferred considerable "windfalls" on some owners within the management area. The authors found that over the 20-year study period the Act produced a significant differential in the rate of appreciation of developed versus vacant properties, with developed properties appreciating at a faster rate than vacant properties. However, the authors also found that the values of the most restricted lands in the Pinelands area increased in value more over the study period than properties in a control area. W. Patrick Beaton, *The Impact of Regional Land-Use Controls on Property Values: The Case of the New Jersey Pinelands*, 67 Land Econ. 172 (1991).

- A study of trends in agricultural land values in Maryland counties with agricultural zoning restrictions found no evidence that the zoning restrictions reduced property values. A private consulting firm prepared the study for the State of Maryland Planning Office, primarily to address the concern that zoning restrictions might reduce farmers' equity in their lands and limit their ability to borrow money. The study looked at trends in sales prices of agricultural properties over periods of a decade or longer in four counties that had adopted agricultural zoning (Anne Arundel, Baltimore, Carroll, and Montgomery) and in two counties that had not adopted such restrictions (Cecil and Howard). The authors concluded that the data revealed no specific trends in land values due to restrictive zoning ordinances and, more specifically, provided no evidence of decreases in land values in counties with agricultural zoning. Robert J. Gray et al., Resource Management Consultants, Inc., The Effects of Agricultural Zoning on the Value of Farmland (1991).

- A study of the effect of exclusive agricultural zoning in Rock County, Wisconsin under the Wisconsin Farmland Preservation Law concluded that agricultural zoning had both positive and negative effects and that the effects varied with parcel characteristics and other factors. The authors examined 120 farmland parcels

> sold in either 1980 or 1981. They concluded that the net effect of zoning depended on the zoning classification, parcel size, and distance from urban centers. According to their results, "agricultural zoning is positively capitalized into land prices for large farmland parcels somewhat removed from urban areas, parcels without much development potential." On the other hand, "[s]maller agricultural parcels relatively close to an urban area sold for a higher price if unzoned, indicating a negative capitalization effect." David M. Henneberry & Richard L. Barrows, *Land Capitalization of Exclusive Agricultural Zoning into Farmland Prices*, 66 Land Econ. 249 (1990).

These and other empirical studies of the effects of regulatory restrictions on the value of regulated private lands are discussed in greater detail in Jeffrey A. Michael & Raymond B. Palmquist, *Environmental Land Use Restrictions and Property Values*, 11 Vt. J. Envtl. L. 437, 450-62 (2010); and William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 Environmental Law 105, 115-17 (2006).

III. The Court's Precedents Recognize that Regulatory Restrictions Have Both Positive and Negative Effects on the Value of Regulated Lands

Careful economic analysis is essential to principled application of the Takings Clause, especially in

the regulatory takings context. As the Court has explained, the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus, "[e]ach of the [Court's regulatory takings] tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 540 (2005). When the alleged burden involves a diminution of the value of regulated private property, a method that accurately calculates how regulation affects value is needed.

Court precedent acknowledges that government regulations in fact have both positive and negative effects on property values. *See Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by [land use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."). In shorthand, the Court has adopted the term "reciprocity of advantage" to describe the economic benefits accruing to regulated property owners from their neighbors' compliance with regulations that apply to all. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). The Court has acknowledged that because regulations have both positive and negative effects, accurate measurement of economic impact must account for both. *See Agins v. City of Tiburon*, 447 U.S. 255, 262 (1987) ("In assessing the fairness of the zoning ordinance, these benefits [conferred on the plaintiff by the

zoning] must be considered along with any diminution in value that the [plaintiffs] might suffer."). Court precedent thus establishes that it is the *net* economic effects of a regulation that must be considered in determining whether a compensable taking has occurred.

The Court has recognized that consideration of the positive effects – as well as negative effects – of regulation should influence the outcome of regulatory takings cases. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1017-18 (observing that most regulations can properly be described as "adjusting the benefits and burdens of economic life . . . in a manner that secures an average reciprocity of advantage to everyone concerned") (internal citations and quotations omitted); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (referring to the "average reciprocity of advantage that has been recognized as a justification of various laws").

The Court has applied the reciprocity of advantage concept by factoring into the analysis of economic impact the benefits generated by the specific regulation being challenged as a taking. For example, in *Agins v. City of Tiburon*, *supra*, the Court affirmed the rejection of a takings claim based on a zoning ordinance restricting minimum lot sizes, reasoning that:

> [t]here is no indication that the [plaintiffs'] 5-acre tract is the only property affected by the ordinance. [The plaintiffs] therefore will share with other owners the benefits and burdens of

> the city's exercise of its police power. In assessing the fairness of the zoning ordinance, these benefits must be considered along with any diminution in value that the [plaintiffs] might suffer.

447 U.S. at 262. Similarly, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court rejected a takings claim based on a development moratorium in the Lake Tahoe basin, relying on the same net benefit-cost reasoning:

> [W]ith a temporary ban on development there is a lesser risk that individual landowners will be "singled out" to bear a special burden that should be shared by the public as a whole. . . . At least with a moratorium there is a clear "reciprocity of advantage," . . . , because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted.. . . . In fact, there is reason to believe property values often will continue to increase despite a moratorium. . . . Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state.

Id. at 341 (internal citations omitted). *See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 135 (1978) (rejecting a takings challenge to New York City's Landmarks Law in part because plaintiff had "been benefited by the Landmarks law"). *Cf. Hodel v.*

Irving, 481 U.S. 704, 715 (1987) (upholding a takings claim but recognizing that the "reciprocity of advantage" created by the statute weighed strongly *against* the claim).

As the foregoing precedents show, the Court has recognized that the net economic benefits of regulation should be considered in determining whether or not a regulation represents a "taking." This approach is consistent with the fact that the economic impact of a regulation – the touchstone of regulatory takings analysis – can only be assessed based on the sum of the negative and positive effects of a regulatory restriction. Some of Petitioners' *amici* suggest that the economic benefits of regulation should count, if at all, in addressing whether the plaintiff is entitled to just compensation and if so in what amount, assuming the court has already determined that a taking has occurred. *See, e.g.*, Brief of *Amicus Curiae* Center for Constitutional Jurisprudence in Support of Petitioners, at 9 (referring to the "'average reciprocity of advantage' exception" to takings liability). This alternative approach is inconsistent with the economic analysis, empirical examples and previous reasoning of the Court described above.

While the Court typically focuses on the positive effects of the specific regulation the owner is challenging as a taking, it has also articulated a broader conceptual version of reciprocity of advantage. In *Kirby Forest Indus. v. United States*, 467 U.S. 1, 14 (1984), quoting *Andrus v. Allard*, 444 U.S. 51, 67 (1979), the Court said that its analysis of takings claims starts

from the premise that citizens must bear most economic burdens "as concomitants of 'the advantage of living and doing business in a civilized community.'" In the same vein, in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987), the Court stated:

> The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

Id. at 492 n.21. The California Supreme Court has also embraced this broad version of the reciprocity concept: "[T]he necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good." *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643, 675-76 (2002).

This broad conception of reciprocity of advantage highlights the difficulty of accounting for all of the positive and negative effects of regulation on property

value. Restrictions imposed on owners of buildings in an historic district subject to historic preservation rules can confer benefits on owners of properties in an adjacent area whose compliance with other regulations, such as density rules, confer benefits on everyone else in the community, including the owners in the historic district. It is difficult to calculate all of the offsetting benefits and burdens with precision. But the challenge of doing an exact accounting cannot justify ignoring the positive effects of regulation nor can it obviate the need to consider broadly shared reciprocal benefits and burdens in the context of takings law.

While the reciprocity of advantage concept (in either a narrow accounting or broad conceptual version) is central to takings law it is not the only relevant economic consideration under the Court's takings jurisprudence. For example, the transactions costs of administering a system of compensation for economic losses caused by government action weighs against attempting to remedy all such losses under the Takings Clause, as the Court has observed: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). *See also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214 (1967) (observing that the magnitude of "settlement costs" are relevant in designing an economically rational compensation scheme).

Furthermore, takings analysis encompasses more than strictly economic factors. The threat of harm due to a regulated activity is generally recognized as a relevant factor in takings analysis even if it is not accountable in economic terms. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1026, citing *Keystone Bituminous Coal Assn.*, 480 U.S., at 513-14 (Rehnquist, C.J., dissenting) (observing that, at least in cases not involving regulations eliminating "all economically viable use," the harmfulness of the regulated activity has been recognized as a relevant consideration in takings analysis). In addition, the "right to exclude" is protected by the Takings Clause even though impairment of that right may produce minimal economic harm. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). While sound economic analysis is essential to the logical, principled application of the Takings Clause, modern takings doctrine is obviously also about more than economics.

Despite the complexities of modern regulatory takings analysis, the central issue in most regulatory takings cases remains the degree of diminution in property value (if any) caused by a regulation. And for that purpose, for all the reasons discussed above, both the negative and positive effects of regulation must be counted.

IV. Appraisal Evidence Purporting to Show that Regulations Adversely Affect Property Values is Misleading

The foregoing analysis leads to an important observation about modern takings litigation: The method ordinarily used by litigants and courts to determine whether and to what extent regulation reduces property value is fundamentally misleading. As discussed, the "economic impact" of a regulation is a central issue in most regulatory takings cases. The usual way to measure economic impact for the purpose of takings litigation is to obtain appraisals from experts concerning the value of the property "without the regulation" and "with the regulation," and then to subtract the latter figure from the former to arrive at an estimate of the "loss" in value due to the regulation. This is commonly referred to as the "with and without" or "before and after" appraisal methodology. While estimating the value of the property "with the regulation" is relatively straightforward (it is simply the current market value of the property subject to the current regulation), estimating the value of the property "without the regulation" is far more difficult. In fact, the usual method for estimating this figure yields an inflated number, which in turn leads to an inflated estimate of the diminution in value due to regulation.

"The most common appraisal technique is to examine a small group of comparable sales. . . . , [which] identifies a small number (typically three) of recently sold properties that are most like the property being appraised." Jeffrey A. Michael & Raymond B.

Palmquist, *Environmental Land Use Restriction and Property Values*, 11 Vt. J. Envtl. L. 437, 450 (2010). Once "comparable" properties have been identified, appraisers typically make "adjustments in value" to account for characteristics that make particular properties more or less valuable than the one being evaluated. *Id.* Appraisers hired by plaintiff and defendant typically develop independent estimates of the value of the property "with" and "without" the regulation: they then use these figures to generate independent estimates of the "loss" in value due to the regulatory restrictions. The trier of fact is left to sort out any conflicts over the valuation evidence.

In this case, the parties and the trial court used this traditional approach to determine whether and to what extent the Murrs suffered a "decline" in the value of their property due to the zoning regulation. Plaintiffs' appraiser compared the value of Lot E assuming it could be developed with the value of Lot E assuming it could not be developed. *See* Cert. Rec., Docket No. 21, pp. 69-88 (appraisal prepared by Timothy Williamson). Defendants' appraiser compared the value of Lots E & F combined assuming they both could be developed with the value of the two lots assuming only one could be developed. *See* Cert. Rec., Docket No. 17, pp. 3-149 (appraisal prepared by Scott Williams). Despite these differences, both sides used the same basic appraisal methodology: They attempted to estimate the value of the property "without regulation" by looking at the market value of other "comparable," developable riverfront properties along the St. Croix River.

The problem with this customary approach, which is not consistent with the approach economists use to estimate the effect of regulation on property value, is that it yields an inflated estimate of the value of the property "without the regulation." Following the usual method, the comparables used in this case were based on the sales prices of other similar, developable properties along the St. Croix River in the general vicinity of the Murr property. But the value of these comparables necessarily reflects the positive amenity and scarcity effects of the zoning regulation that gave rise to this takings dispute. Using a figure based on this type of comparable to estimate the value of the property "without" the regulation is misleading because the value of the comparable is inflated by the regulation's scarcity and amenity effects. In other words, this methodology is inherently flawed because it assumes that the regulation will remain in place for everyone else, and then asks what the value of the claimant's property would be if he or she were granted a special exemption from the restrictions that apply to everyone else. *See* William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 Environmental Law 105, 107 (2006).

The correct approach to estimating the value of the property "without the regulation" would be to determine what the value of a claimant's property would be if the regulation had not been adopted and did not apply to anyone in the community. Calculated in this fashion, the "without regulation" value would reflect

neither the negative development effect of the regulation nor its positive amenity and scarcity effects. Only by approaching the economic impact issue in this net and holistic fashion can the analysis capture both the positive as well as the negative effects of regulations on property value. Unfortunately, this type of counterfactual analysis of land value is far more time-consuming and difficult to perform than a simple with-and-without appraisal. In fact, in the context of a specific takings case arising from the rejection of a particular development proposal, it may well be nearly impossible to determine what the value of the property would be if a regulation had never been adopted and did not apply to anyone.

Furthermore, the standard appraisal method will invariably indicate that a regulation has reduced a property's value regardless of whether the actual net effect of the regulation is negative or positive. *See id.* at 126 ("Evidence that the value of an individual exemption [from] a land use regulation is positive does not, by itself represent proof or unequivocal evidence that the enactment of the land-use regulation reduced the property's value."). An individual property will invariably have a higher value if a regulatory restriction is lifted from that specific property. But this does not alter the reality that adoption of a new regulation across an entire community will have both positive and negative effects and may well have a net positive effect on individual properties. As a result, the appraisal technique will sometimes suggest that a regulation has reduced a property's value even when, considering

all of the relevant effects, "the regulation has raised the property value." *Id.* at 107.

In sum, it is clear that a simple before-and-after or with-and-without calculation of property values using standard appraisal techniques will often generate figures that overstate the actual adverse effect (if any) of a legal restriction on the value of restricted property. Beyond that, the standard appraisal technique will invariably indicate that regulation has a negative effect on property value, even if the actual net effect is neutral or even positive. This is not to suggest that the use of appraisal evidence is necessarily illegitimate in takings cases; appraisals may be the only readily available (albeit flawed) evidence of the effect of a regulation on property value. But sound economic thinking underscores the importance of great caution in the use of appraisal evidence and suggests the need for the Court to disavow the "fantasy" that "restrictions imposed on land invariably reduce land's value." Laura S. Underkuffler, *Takings and the Problem of Value: Grappling with Truth in Land-Restriction Cases*, 11 Vt. J. Envtl. L. 465, 476 (2010).

V. The Lot Merger Provision Allows Petitioners to Make Reasonable Use of Their Land While Not Conferring an Economic Windfall on Them.

Focusing on the *Murr* case in particular, the foregoing economic analysis supports the conclusion that St. Croix County's lot merger provision does not likely

impose any economic burden on Petitioners and probably avoids conferring an economic windfall on Petitioners which is not available to their neighbors.

A comprehensive system of land use regulation governs the permitted uses of the Murr property and other private lands bordering the St. Croix River. The St. Croix National Scenic Riverway, which stretches for a total of 252 miles, is commonly divided into two segments, the Upper St. Croix and the Lower St. Croix. In 1968, Congress enacted the Wild and Scenic Rivers Act, designating 200 miles of the Upper St. Croix and its tributary the Namekagon River as one of the initial components of the national Wild and Scenic Rivers System. P.L. 90-542, § 2(b)(6). In 1972, Congress passed the Lower St. Croix River Act, adding the Lower St. Croix River to the system. P.L. 92-500. The 1972 legislation immediately added the 27-mile upper portion of the Lower St. Croix to the system, *id.*, § 2, and authorized the Secretary to designate the 25-mile lower portion of the Lower St. Croix upon approval of an application for such designation by the Governors of Minnesota and Wisconsin. *Id.* The Murr property is located in the lower portion of the Lower St. Croix River. Today, the entire Lower St. Croix is jointly managed by the National Park Service, the Minnesota Department of Natural Resources and the Wisconsin Department of Natural Resources. *See* Lower St. Croix Cooperative Management Plan (January 2002), https://www.rivers.gov/documents/plans/lower-st-croix-plan.pdf. (The Upper St. Croix, which is comparatively undeveloped and includes substantial areas of public

land, is administered by the National Park Service. *See* National Park Service, Upper St. Croix and Namekagon Rivers, General Management Plan (1998), https://www.nps.gov/sacn/learn/management/upload/SACN_1998_GMP.pdf)).

In 1974, to help carry out the objectives of the national Wild and Scenic Rivers Act, as well as "to ensure the continued eligibility of the Lower St. Croix river for inclusion in the national wild and scenic rivers system," Wisconsin enacted Ch. 197, Laws of 1973, entitled "AN ACT to create s. 30.27 of the statutes, relating to preservation of the lower St. Croix river and granting rule-making authority." Ch. 197, effective May 7, 1974, was codified at WI Stat. § 30.27. The legislation directs the Wisconsin Department of Natural Resources ("DNR") to promulgate "guidelines and specific standards" for local government zoning ordinances along the length of the Wisconsin side of the Lower St. Croix River. *Id.* The guidelines were promulgated as Wisconsin administrative rules in the Wisconsin Administrative Code, Chapter NR 118, Standards for the Lower St. Croix National Scenic Riverway. The current version of ch. NR 118 appears at http://docs.legis.wisconsin.gov/code/admin_code/nr/100/118. The rules divide the Wisconsin side of the Lower St. Croix riverway into five "management zones": river town; small town; small town historic; rural residential; and conservation. *Id.*, NR 118.04. The majority (86%) of the Wisconsin Lower St. Croix Riverway area is designated either rural residential zone or conservation zone, with a minority of the lands (14%) included in the other three

zones. Cooperative Management Plan, at 28-29. The Murr property is located in the "rural residential" zone under the DNR rules.

The DNR rules prescribe various standards for local government zoning ordinances, including restrictions relating to permitted uses, building density, building height, building setback, and so forth. Consistent with the Lower St. Croix Cooperative Management Plan's descriptions of the "rural residential" zone ("no large concentrations of development or people") and the "conservation" zone (a "largely natural scene"), *see* Cooperative Management Plan, at 25-26, relatively more stringent standards apply in these zones than in the other three zones. Of particular relevance to this case, the DNR rules allow the minimum lot size requirements in the river town, small town, and small town historic districts to be determined by "the local riverway ordinance." NR 118.06(1)(a). By contrast, the DNR rules mandate that lots in the rural residential and conservation zones "shall have at least one acre of net project area." *Id.* "Net project area" is defined as "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands." NR 118.03(27). As a result of this definition, a property owner will commonly need to own more than one acre to build in conformity with the rules.

In accordance with the DNR guidelines, St. Croix County adopted a Riverway Overlay District ordinance, which applies to the unincorporated riverfront lands in the County. *See* http://www.co.saint-croix.wi.us/vertical/sites/%7BBC2127FC-9D61-44F6-A557-17F28

0990A45%7D/uploads/Ch_17_SUBCHAPTER_III.V_Riverway(1).pdf. All of the lands subject to the ordinance are included in either the rural residential or conservation zones under the DNR rules. The County ordinance specifies, in accordance with the DNR guidelines, that for all lands subject to the ordinance the "[m]inimum net project area for each lot shall be at least one acre." *Id.*, Section G.1.

The river-protection regulations of St. Croix County are complemented by similar land use regulations adopted by other jurisdictions that border the Lower St. Croix River. For instance, on the Wisconsin side of the river, other counties in addition to Lower St. Croix County have adopted zoning rules to conform to the DNR Scenic Riverway rules. *See, e.g.*, Polk County Lower St. Croix Riverway Ordinance, http://www.co.polk.wi.us/vertical/sites/%7BA1D2EAAA-7A29-46D6-BF1A-12B71F23A6E1%7D/uploads/LowerStCroixRiverwayOrdinance.pdf. On the Minnesota side of the river, Minnesota, like Wisconsin, responded to the enactment of the national Lower St. Croix River Act of 1972 by adopting its own Lower St. Croix Wild and Scenic River Act. *See* Minn. Stats. § 103F.351. That act directs the Minnesota Department of Natural Resources to issue rules which, like the Wisconsin rules, set minimum standards for local zoning by individual communities along the river. Minnesota Administrative Rules, Department of Natural Resources, § 6105.0380. For example, the Minnesota rules specify a minimum lot size of "not less than 2½ acres" in "rural districts." As in Wisconsin, local governments are responsible for the

actual administration of the land use regulations. *See* Minnesota Department of Natural Resources, *Lower St. Croix River: A National Wild and Scenic Treasure*, http://files.dnr.state.mn.us/publications/waters/lower_st_croix_brochure.pdf. In sum, the States of Wisconsin and Minnesota, working in concert, have established a comprehensive regulatory program governing land development along the length of both sides of the Lower St. Croix River.

The Wisconsin DNR rules state that one of their purposes is to "maintain property values" along the Lower St. Croix River. NR 118.01. In light of the economic analysis in the preceding sections of this brief, this objective is entirely sensible and achievable, despite the fact that the County regulations impose relatively stringent restrictions on development to preserve the scenic and recreational values of the river. On the one hand, the St. Croix County land use regulations have a negative development effect insofar as they restrict property owners from developing or otherwise using their land along the river in a fashion that would be permitted in the absence of the regulations. On the other hand, the County regulations, by themselves and as supplemented by regulations adopted by other jurisdictions in Wisconsin and Minnesota, create a positive amenity effect by preserving the scenic beauty of the Lower St. Croix River corridor that makes it an attractive place to live and own property. In addition, these regulations produce a scarcity

effect by limiting the amount of development, increasing the values of existing properties and legally approved building sites. For the reasons described above, the net effect of these burdens and benefits is difficult to estimate, but there is no *a priori* reason to believe that the regulations have a net negative effect on land values along the Lower St. Croix River.

Petitioners are owners of substandard lots that do not meet the applicable minimum lot size requirement. In a typical case involving a substandard lot, to enforce the minimum lot size requirement against the owner of the lot could preclude any substantial economic use of the lot. However, to waive the minimum lot size requirement based on the lot's dimensions could undermine the goals of the zoning, in this case protection of the scenic and recreational qualities of the Lower St. Croix River. Presented with this choice, St. Croix County, as authorized by the DNR guidelines, NR 118.08, has adopted a "grandfathering" provision waiving the minimum lot size requirement for substandard lots. Riverway Overlay District ordinance, *supra*, Section I.4. This case is complicated, however, by the fact that Petitioners own two *adjacent* substandard lots. Thus, this case raises the question of whether Petitioners should receive two waivers (one for each lot), or should be restricted to one house on the two lots. The County's Riverway Overlay District ordinance requires "merger" of adjacent substandard lots for zoning purposes, and Petitioners sued alleging a "taking," claiming that each lot should be regarded as the relevant

"property" for the purpose of takings analysis. Petitioners contend, in effect, that as a matter of constitutional doctrine, they should be entitled to build on both substandard lots, and if they are barred from building on one of their lots they should be entitled to financial compensation for the "burden" imposed on them by the regulation.

The preceding economic analysis suggests that allowing Petitioners to build on both substandard lots is not necessary to avoid imposing an economic burden on them. In fact, it suggests that that allowing them to do so would confer an economic windfall on Petitioners not available to other riverfront property owners. The owner of a substandard lot allowed through grandfathering to develop in a manner inconsistent with current zoning suffers no adverse development effect. But like other property owners in the community, she enjoys the positive amenity and scarcity effects created by the zoning. A grandfathered lot owner thus receives only economic benefit from the zoning regulations whereas owners of other properties in the community experience a mix of positive and negative effects. The holder of the grandfathered lot can appropriately be regarded as receiving a windfall relative to other property owners. Such a windfall, even if arguably "unfair" in some sense, can be defended as necessary to avoid inflicting a "wipeout" on the owner of a pre-existing substandard lot by strict enforcement of the zoning.

But when, as in this case, the owner possesses two *adjacent* substandard lots, the results of the analysis are quite different. Granting waivers for each of the

lots would mean that the owner, again, would be solely benefited by the zoning regulation. As in the single substandard lot case, the owner would gain from the positive amenity and scarcity effects resulting from the neighbors' compliance with the minimum lot size requirements. The only distinction is that the size of the windfall would increase if the owner were permitted to build on two substandard lots rather than just one. At the same time, the owner would incur none of the burden imposed by the zoning regulation, because she would be allowed to develop both lots in disregard of the zoning. On the other hand, if the lot merger provision is enforced, and the owner is allowed to develop one lot but is denied permission to develop the other, she is both benefited and burdened by the regulation, just like other owners subject to the zoning rules. She is benefited because her opportunity to develop the property is made more valuable by the regulatory restrictions on other properties in the community. But she is also burdened because she is subject to the same restriction – per unit of land area – as other owners. In sum, under a lot merger provision, an owner is treated the same as other similarly situated owners and is denied an economic windfall not available to other property owners.

An example will help illustrate the point. Assume three neighboring land owners along the river own four acres, two acres and one acre respectively. If one-acre residential zoning is enacted, the owners are allowed to build four, two and one unit of housing on their properties; each owner is allowed to build one

house per acre. Assume instead four neighboring landowners who own four, two, one and one-half acres of land. Applying a substandard lot provision, the owner of the one-half acre lot would be permitted to build, even though this will detract from the zoning plan and the owner will reap the economic benefits of the zoning while incurring none of the burden; this outcome can be justified as necessary to avoid a wipeout. Finally, assume three neighbors who own four, two and one acres, and a fourth neighbor who holds two adjacent half-acre lots. Under a lot merger provision, the owner of the two adjacent substandard lots would be permitted to build one house per acre, just like her neighbor who also owns one acre; both owners would be equally burdened and benefited by the restrictions in economic terms. But if the lot merger provision were declared unconstitutional, and the owner were permitted to build on both lots, the owner would be permitted to build at twice the density of the neighbor who also owns one acre of land; and the owner of the substandard lots would reap the benefits of the zoning while avoiding all of the burden.

This reasoning suggests that the County's lot merger statute is eminently "fair and just" in the sense that it imposes no greater net economic burden on the Petitioners than on neighbors up and down the river. Indeed, it is arguably the *most* "fair and just" solution to the question of how to apply minimum lots size requirements to commonly owned adjacent substandard lots, because it avoids allowing Petitioners to build at a higher density than their neighbors and it thereby

avoids conferring a unique economic windfall on them. Stated differently, a constitutional rule that mandated that the County allow development on both adjacent lots would produce gains for the Petitioners that can only be described as arbitrary. Were courts to ignore the common ownership of adjacent substandard lots, they would privilege those who own separate but contiguous properties over those who own a single property of size equal to the two contiguous parcels.

More generally, this analysis points out the hazard implicit in the narrow approach to the relevant property (or "denominator") issue advocated by Petitioners and their *amici*. Defining the relevant property based on the entirety of a contiguous tract allows a court to consider those portions of the property which have been particularly benefited by the regulation as well as those portions of the property which have been especially burdened. But the more latitude takings claimants are accorded to define the parcel narrowly, the greater the risk that land owners will reap the economic benefits of regulation while simultaneously seeking "just compensation" from the public by focusing largely if not exclusively on the burden imposed by regulation.

CONCLUSION

For the foregoing reasons, the *amici* economists urge the Court to affirm the judgment below.

Respectfully submitted,

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